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Supreme Court of the United States

No. 653

MRS. BRYNIA BYRD AND MRS. ETHEL GOLD,
Petitioners,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS, AND L. B. STEIN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES.

No. .....

MRS. BRYNIA BYRD AND MRS. ETHEL GOLD,
Petitioners,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS, AND L. B. STEIN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on October 22, 1958.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit announced on June 30, 1958 (but due

to a Petition for Rehearing judgment was not entered thereon until October 22, 1958) is reported in 258 F.2d 168. A copy thereof is appended to this Petition as Appendix A.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

The opinion in the above case was rendered on June 30, 1958 and a Petition for Rehearing was timely filed. Upon overruling such Petition for Rehearing, the United States Court of Appeals for the Fifth Circuit entered judgment in this case on October 22, 1958. A copy of said judgment is appended to this Petition as Appendix B.

QUESTIONS PRESENTED.

This is a suit for accounting and discovery filed by the Petitioners where the Court ordered the Respondent, Lawrence Stein as defaulting Trustee to make discovery and account for his Trusteeship beginning in 1935. The questions presented are:

1. For the first time in our jurisprudence the question arises whether the "Net Worth Theory" may be substituted as the sole basis for a fiduciary accounting in equity.

2. The United States Court of Appeals for the Fifth Circuit has rendered contradictory opinions in the same case.

3. Where trust property of unknown and uncertain amount is hopelessly commingled with the Trustee's own property and the defaulting Trustee is unable to separate his own property, can there be an apportionment supported only by estimates and not by any acceptable accounting method.

4. Due process of law is violated by the admission and use of hearsay testimony about an income tax schedule vital to the opening worth of the Trustee, the existence of which schedule has been denied by the Trustee and never produced for examination or verification after repeated demands by Petitioners pursuant to the Federal Rules.

STATEMENT OF THE CASE.

This is a suit for accounting brought by the Petitioners against their brother as Trustee under their father's Will.

The Trust began on March 10, 1935. The gross estate exceeds 3 million dollars. A diversity of citizenship exists since the Petitioners were residents of Missouri and Tennessee and the Trustee a resident of Mississippi.

The District Court found for the Trustee but the Court of Appeals for the Fifth Circuit reversed the case and held:

> "From the foregoing plain facts and other evidence in the record, we are of the opinion that Lawrence Stein was acting as trustee of the estate as provided under the Will, but was commingling the funds of the estate with his own, and was not properly ac-

> counting to the beneficiaries of the trust . . . As trustee under the will, Lawrence was under a duty to act solely in the interest of his beneficiaries. Having failed to do so, he has violated the trust, and is obligated to make full and complete accounting and discovery as prayed for in the appellants' complaint." (See Appendix C.)

On Petition for Rehearing, the Court of Appeals emphasized:

> "the evidence in this case overwhelmingly shows that Lawrence Stein assumed the role of trustee under his father's will and acted in that capacity many times to his pecuniary advantage . . . It would shock the conscience of the Court to allow a fiduciary to play fast and loose with his *cestuis que* trust." (See Appendix D.)

On remand, the Trustee filed an unsatisfactory account and the District Court appointed a Master who prepared a lengthy report. The District Court adopted the Master's Report and on appeal, the Circuit Court of Appeals affirmed the case from which action this appeal is desired.

The Trustee had kept no books, thereby violating the express direction of the Will. His records were completely lacking or inadequate and he could not render an accounting of his Trusteeship.

Being unable to account for the sums coming into his hands or to separate his own property from the commingled funds, the defaulting Trustee and the Master took the doubtful net worth at the beginning of the trust period

and the supposed net worth at the time of the report and using the "Net Worth Method" undertook to determine the net income of the estate, thereby relieving the defaulting Trustee of the necessity of keeping proper records or proving the amount and reasonableness of his expenditures during the entire period of his Trust.

In addition, the Trustee and the Master then undertook to apportion the admittedly commingled funds, which the defaulting Trustee could not separate, on an arbitrary estimate without knowing with any certainty whatever what part of the funds belonged to the Trust and what part belonged to the Trustee.

The supposed accounting is further complicated by the utter lack of proof by proper evidence of any beginning worth on the part of the Trustee. All income tax statements had been properly demanded by the Petitioners and the Trustee had denied the existence of any such statements for the year 1935. Repeated demands were made and repeated denials were forthcoming. Yet when the Trustee filed his report, his accounts referred to an income tax schedule attached to the 1935 income tax report as the basis of their opening net worth. The production of this schedule was again demanded but its production was never forthcoming and its absence never explained except to say that it was lost. The Petitioners never had an opportunity to examine or verify the items of the alleged opening net worth based on this hearsay figure. Petitioners were denied the right of discovery, examination and cross-examination and the entire "net

worth theory" was built on this vague unproduced hearsay foundation.

REASONS FOR GRANTING THE WRIT.

1. Use of the "Net Worth Theory".

A fiduciary occupies a different position in law than an ordinary individual engaged in his own private business affairs. The morals of the Market place do not prevail. *Meinhard v. Salmon*, 249 N.Y. 458, 164 NE 545.

Certainly the cat and mouse morals of income tax responsibility are not appropriate for a Trustee.

The requirements on a Trustee are exacting. His duties and responsibilities are carefully delineated. He must act in "the highest good faith."

A trustee must identify, earmark and separate the Trust Estate and not mingle trust funds with his own. 3 Bogert 74, Section 596, Restatement on Trusts, Section 456, 4 Pomeroy's Equity Jurisprudence 219.

A trustee must keep full, accurate and orderly accounts which show that his expenditures were correct, just and necessary. Especially is this true if the will or trust instruments requires the keeping of adequate books, as in the present case. 3 Bogert 239, Section 962.

All presumptions are against the Trustee. Obscurities and doubts are resolved adversely to him. 4 Bogert 239, Section 962; 4 Pomeroy 117, Section 1063.

Neither difficulties of making proof of his account, illness nor misconception of his responsibility relieves the Trustee from rendering a full and complete account. 1 Restatement on Trusts, Sec. 201; 65 C.J. 878; *Fisher v. Stayton*, (Ill. 1956) 134 NE(2d) 675.

The burden of proof is upon the Trustee to show that he has performed his trust in an acceptable manner. *Garrett v. Bank*, (5th Cir.) 153 F.(2d) 289.

When a Trustee is required to account, he is expected to do so by some acceptable accounting method and to comply with the usual strict standards of fiduciary accounting. Restatement on Trusts, Secs. 172; 1 C.J.S. 679,

All of the above principles are well established fundamentals of our general Jurisprudence to which Mississippi scrupulously subscribes Griffith, Mississippi Chancery Practice, Sec. 47; *Adams v. Westbrook*, 41 Miss. 385.

Lawrence Stein, as Trustee, was ordered by the Circuit Court of Appeals "to make full and complete accounting and discovery". Opinion Appendix C.

This can have no other meaning than to account according to the accepted method of accounting in all fiduciary matters.

Lawrence either failed to keep or destroyed any records that he had, shortly after the income tax collector got after him in 1940.

Being unable to properly account, the Trustee relied on the Net Worth Method and the Master followed suit.

The Master said:

> "You will understand that I cannot definitely state or certify that all gross income is included in the statement on page 29 for the reason that complete records were not available for the entire period. Likewise, I am unable to certify that all expenses have been included in the statement for the same reason. On the other hand, I do believe that the net income is reasonably stated, under the conditions, as all precautions have been taken in the determination of said net income under the 'Net Worth increase plus expenditures Method'" (Master's Report C-6).

The only determination of net income was by the Net Worth Method.

The Circuit Court of Appeals approved the use of the Net Worth Method in its last opinion attached as Appendix A. No authority or precedent for such action is cited.

The gross income was estimated to be at least $3,083,750.46. The net income, calculated by the Master from the Net Worth Theory, amounted to $820,520.90. Therefore, the presumed unproven expenses gratuitously credited to the Trustee in an anonymous, impenetrable, lump sum amounted to $2,263,229.56. This was a vast benefit to the Trustee. His claimed credits could not be questioned.

If a Trustee may discharge his duty to account by using the Net Worth Method and thereby cast the burden of explanation or negation on the beneficiary, then a guardian of a baby child or of a lunatic might likewise do so and be relieved of proof of his stewardship.

The present case is consequently most important because if affirmed, it will open up an entirely new concept of fiduciary accounting. A trustee may decline to keep books or destroy his records and still receive the benefit of deductions by use of the Net Worth Theory.

The Net Worth Theory is not an accounting method at all. *Holland v. U. S., infra.*

This theory, evolved in the government's battle for revenue, was first utilized in such cases as *Capone v. United States*, 51 F.2d 607 and *Guzik v. United States*, 54 F.2d 618. Later it came before the Supreme Court in the case of *United States v. Johnson*, 319 U.S. 503, 87 L.Ed. 1546.

It was first used in tax fraud prosecutions and later broadened to ordinary civil tax cases for the collection of delinquent income taxes.

Up until the present case, it has never been applied in any other situation than the prosecution of tax fraud cases or the collection of delinquent income taxes.

The Court has taken many precautions in approving the use of the Net Worth Method in tax cases because it is fraught with many dangers.

Now the Court must decide whether it ever conceived that the Net Worth Method could properly be utilized as the basis for fiduciary accounting, totally disconnected with any income tax problem.

The best and most complete discussions of the Net Worth Method is set forth in *Holland v. United States*, 348 U.S. 121, 99 L.Ed. 150 and the comprehensive annotation thereto.

The use of the Net Worth Method in a fiduciary accounting by a Trustee reverses all of the presumptions heretofore existing.

Net worth computations rest "solely upon approximations and circumstantial inferences". These approximations and circumstantial inferences are presented by the defaulting Trustee in lieu of books and records since he cannot prove a net income by showing his expenditures. Since no credits are allowed as expenditures without some acceptable evidence, the Trustee is allowed to rely on approximations and circumstantial inferences to establish net income.

The idea of the Net Worth Method was to cast the burden of explanation upon the delinquent tax payer who had or should have had available all of the information necessary to reveal the true facts.

The burden of proof rests always on the Trustee.

By using the Net Worth Method in a fiduciary accounting to ascertain net income, the burden of explanation and

negation is cast upon the beneficiaries who never possessed the records and never had any responsibility for keeping the accounts.

Skillful concealment becomes an invincible barrier to proof, and the beneficiaries find themselves in a completely helpless position.

The presumption of net income is indulged favorably to the Trustee to give him credit for unknown expenses which the beneficiaries are powerless to challenge.

It is no disadvantage to Lawrence Stein to be credited with over 2 million dollars in expenses without any proof thereof. It is an advantage no other Trustee in American judicial history has received.

The gross income is estimated to be in excess of $3,000,000. The expenses are unknown because the Trustee has either not kept or destroyed any books or records.

To say to such a Trustee that he is excused from his default and permitted to ascertain his net worth by an approximation or circumstantial inference instead of by the usual methods of fiduciary accounting is a tremendous advantage to the defaulting Trustee. His default is approved. It is unimportant for him to keep accounts.

If it had not been to the advantage of the Trustee, he would never have undertaken to use the Net Worth Method in his own account as a substitute for accounting.

The use of the Net Worth Method in this case was a 2 million dollar boon to the defaulting Trustee. It was a violation of every rule of trust accounting and will set a precedent that will come to haunt our Courts many many times unless its extension to the field of fiduciary accounting is immediately and abruptly halted.

2. Conflicting Opinions of the Circuit Court of Appeals.

The excuse is offered that Lawrence Stein, the Trustee "believed that he was renting" . . . "and was not a willful violator of the Trust" and "he did not realize that he was a Trustee . . . but was under a misapprehension of the obligations." (Opinion of the Circuit Court of Appeals, Appendix A.)

This was the very heart of the Trustee's original defense. This directly conflicted with the holding of the same Circuit Court of Appeals that rejected the original defense and ordered the accounting after adjudicating that "the evidence in this case overwhelmingly shows that Lawrence Stein assumed the role of Trustee under his father's Will and acted in that capacity many times to his pecuniary advantage". (Opinion on Rehearing, Appendix D.)

These two opinions of the Circuit Court of Appeals are in direct conflict.

Since the Circuit Court of Appeals is apparently confused, this Court should take cognizance of the case in order that a consistent and just determination may be made.

3. The Apportionment is Based on Estimates.

On the basis of *Fant vs. Dunbar*, 71 Miss. 576, apportionment of the supposed net income derived from the Net Worth Theory was allowed.

Fant v. Dunbar expressly limits apportionment to a situation where "it is entirely certain" what part was the money of the Wards and what part was the money of the Guardian.

The Court has misconstrued the rule in *Fant v. Dunbar*.

Production and earnings from the land are ignored. The portions are arbitrary guesses.

4. Due Process of Law.

Rules 34 and 37 of the Federal Rules of Civil Procedure provide for discovery and production of documents as an essential part of court procedure.

Petitioners repeatedly demanded production of all income tax returns of the Trustee particularly for 1935.

The Trustee and his attorneys many times denied the existence of any such record.

Yet on the accounting and in the Master's Report the sole basis for Lawrence Stein's opening net worth is a vague unseen memorandum alleged to have been a copy of a schedule attached to the 1935 income tax return of Lawrence Stein.

Upon further demand for production of said pencil memorandum of said schedule, it developed that the

Master had never seen the schedule and it could not be produced for examination. The Master had used the hearsay information in his report without any verification.

Objections to its use were duly made and a Motion was made to strike those portions of the Master's Report based on said unproduced income tax schedule.

The Court overruled the objections and the Motion. Therefore, Petitioners were again placed in a helpless position. They were denied the right of examination and cross-examination based on said hearsay 1935 schedule.

Such was a denial of Due Process of Law.

The case of *Wisdom v. Stegall*, 219 Miss. 776, 70 So.2d 43 is analogous.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and this case should be set down for argument at the earliest practicable time.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16826

MRS. BRYNIA BIRD and MRS. ETHEL GOLD,
Appellants,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS, and L. B. STEIN,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(June 30, 1958)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This is a suit for an accounting by two sisters against their brother as trustee. The sisters, Mrs. Brynia Stein Bird and Mrs. Ethel Stein Gold, described their brother, Lawrence Stein, as "a modern Esau who in sheep's clothing . . . deprived them of their rightful inheritance". Lawrence accuses

his sisters of wanting to "crush out [him] economic life in order that they may plunder the product of a life-time's toil".

The case is before us for the second time. The sisters, successful on the first appeal but appellants again, charge the trial judge with "again gulping hook, line and sinker the wriggling, slippery, elusive and double-tongued oral testimony of Lawrence Stein" and "throwing the same white cloak of immunity over the black testimony of Lawrence Stein . . . this Court of Appeals ripped away". This, say the complainants, is "the first instance of a district court reversing the decision of a Circuit Court of Appeals." Appellants put this Court on notice, in the first sentence of their brief, that "the whole philosophy and jurisprudence of fiduciary accounting are at stake in this case".

The briefs are long, exhibits numerous, the Master's Report detailed, the record hefty. We have gone through all of this painstakingly, and the twenty-seventh Chapter of Genesis besides.[1] We reach these conclusions. Fiduciary accounting is not imperiled. The district court has not reversed this Court. Instead, with the patience of Job, the able, conscientious trial judge complied with the mandate of this Court as fully as the involved facts of the case and inter-Stein hyperbolic jeremiad permitted.

[1] Contrary to the apellants' understanding of the biblical story, Esau was the favored son upon whom Isaac intended to bestow his blessing, and it was Jacob, not Esau, who came with subtlety to his father wearing the skin of young goats upon his hands and the smooth of his neck. "The voice is Jacob's voice, but the hands are the hands of Esau".

The case turns on questions of fact. We hold that the findings of the trial judge are not clearly erroneous.

I.

V. A. Stein and his wife bought Little Hope Plantation in Washington County, Mississippi, in 1904. The tract consists of 378 acres of which 280 were open cultivatable acres in 1935. The Steins raised eight children[2] in comfortable circumstances. Several helped on the farm and in the store, but Lawrence worked more closely with his father than the other children and was the favored son. V. A. Stein died August 27, 1933. Under his will he left a life estate in his property to his wife, Sara, with the remainder in trust for his seven surviving children and two grandchildren. Lawrence and Ethel were named co-trustees. The trustees were instructed to hold, operate, or rent the property for ten years after Sara's death, no distribution to be made for three years. The trust came into existence when Sara died, March 10, 1935. According to Lawrence, he rented Little Hope from his mother for $3,000 a year; after his mother's death, he stated to his brothers and sisters, assembled

[2] Of the eight children: (1) Mrs. Bessie Stein Wolfe predeceased her parents, leaving two children, Dr. Sharkey Wolfe and Mrs. Fayette Wolfe Schlessinger; (2) Sol Stein died in 1943 and left his estate to Lawrence; (3) Sam Stein died sometime after 1950 and before 1955; (4) Mrs. Fannie Schwartz lives in Greenville, Mississippi; (5) Mrs. Ella Cornblatt lives in Eudora, Arkansas; (6) Mrs. Ethel Gold lives in Dyersburg, Tennessee; (7) Mrs. Brynia Bird lives in Kansas City, Missouri; (8) Lawrence lives in Chatham, Mississippi. Mrs. Bird and Mrs. Gold are the complainants; Mrs. Schlessinger supported them in this litigation. The other surviving sisters, Mrs. Cornblatt and Mrs. Schwartz, and Sam, the surviving brother when the case was first tried, supported Lawrence.

in a family meeting, that he would not serve as trustee but would continue to rent and operate Little Hope as he had done before his mother died. Two sisters and a brother corroborated him; the complainants deny that there was any rental agreement. Lawrence never married. His sister, Mrs. Ethel Gold, after being widowed, resided with him for twenty-two years. It was a close, happy family until 1949, when Lawrence refused to give Mrs. Gold's son sufficient money to establish himself in business. May 19, 1950 Ethel, Mrs. Gold, a co-trustee, and Mrs. Brynia Bird, another sister, filed suit against Lawrence.[3]

The complaint alleges that Lawrence took over Little Hope Plantation and other trust property, managed all of it for his own benefit, commingled trust property with his property, and has never made any accounting. Lawrence defended on the ground that there was no valid trust, since at the time of his death his father had only some personal property (willed to Lawrence) and an interest in Little Hope; that Little Hope was acquired under a deed creating an estate by entirety and therefore this property passed to Mrs. Stein on V. A. Stein's death. Lawrence defended also on the ground that he had refused to act as trustee. The district court agreed

[3] The suit was against Lawrence Stein and Sam Stein, individually and as co-partners in Stein Brothers, and also against L. B. Stein, a nephew. L. B. Stein, son of Sam Stein, was brought in as defendant because he had purchased in 1941 a plantation of 280 acres. The complainants contended that this "grew out of the expansion and development of the original Stein estate" and was a part of the "Stein lands" Lawrence managed. This contention was not pressed. The master found that the trust had no interest in the property.

with Lawrence and dismissed the complaint. 103 Fed. Supp. 299 (1953).

On appeal, this Court reversed and remanded the case "with directions that a full accounting be made, discovery had, a division of the estate effected as the interests of the parties may appear, and judgment rendered against the appellee Lawrence Stein for any amount that may be due to the beneficiaries of the trust". 204 F.2d 122 (1953). A rehearing was refused. 204 F.2d 512 (1953).

In compliance with this decision, Lawrence filed an original account and, to meet various objections of the appellants, three supplementary accounts. The accounts were prepared by his auditors on the basis that in 1935 Little Hope Plantation was the only property in the trust. Appellants requested appointment of a receiver, raising the new contention that the V. A. Stein trust

". . . we are of the opinion that Lawrence Stein was acting as trustee of the estate as provided under the will, but was commingling the funds of the estate with his own, and was not properly accounting to the beneficiaries of the trust. He at no time formally repudiated the trust, and is estopped to deny its validity. . . . Even though the estate which she [Mrs. Stein] held under the original deed prior to her husband's death was a joint tenancy, by electing to take under the will, and acquiescing in that part which bequeathed a portion of the property to her son Lawrence, she impliedly released any interest she might have had as a joint-tenant." Bird v. Stein, 1953, 5 Cir., 204 F.2d 122.

". . . A man may not step into and out of the role of trustee as his personal interest dictates; 'it is easier to step into the role than it is to step out of it and the evidence in this case overwhelmingly shows that Lawrence Stein assumed the role of trustee under his father's will and acted in that capacity many times to his pecuniary advantage. . . ." Bird v. Stein, 1953, 5 Cir., 204 F.2d 122.

included not only Little Hope Plantation but the Johnson Place, the "Stein Brothers" cotton gin, the "Stein Brothers" store, and all other assets which Lawrence claimed were his individual property or assets of Stein Brothers. The trial court found that in 1935 the trust consisted solely of Little Hope.

The district judge, at the appellants' request, appointed a master and referred the trustee's account to him with instructions designed to carry out the mandate of this Court. The master audited the account and found that the trust was entitled to "a part of the grand total net income based upon the contribution of the said trust (Little Hope) in the production of the overall net income" of Lawrence Stein and Stein Brothers. The court below adopted the master's report.

Appellants attack: (1) the court's determination of the property ownership and (2) the court's adoption of the master's report. They contend that in 1935 the trust included the Johnson Place, store, gin and other assets Lawrence claims; that because of the commingling of trust property with Lawrence's property, *all* of Lawrence's property falls in the trust.

II.

The decisive question in the case is, what property constituted the trust estate in 1935? The storm center of this controversy is the ownership of the Johnson Place consisting of 794 acres, of which 502 acres were open cultivatable acres in 1935.

Lawrence went to work for his father in 1918 at $150 a month. He assisted in the store, kept records, aided in the farming, gradually became more important to his father. He testified that his father kept his money for him, except for a little spending money amounting to about $30 or $40 a month. In 1926 he became Postmaster at Chatham. From the first, he was able, industrious, thrifty. While working for his father, he engaged in side-ventures, trading mules, livestock, scrap iron, anything he could make a dollar out of. He began to make enough dollars to be of help to his father from time to time—shifting funds from his account to his father's account.[6]

According to Lawrence, he had been interested for some time in buying the Johnson Place. To obtain sufficient funds for the down payment on the purchase price, he asked his father to pay the money withheld over the years. V. A. Stein told him to "go ahead with your transaction and I will make the money available". Both went to the First National Bank at Greenv[illegible] owner of the property, and spoke with W. H. Negus, [illegible]esident of the bank. After several meetings, they agreed on a price of $31,500, less a first mortgage indebtedness of $16,500 owed the Federal Land Bank to be assumed by Lawrence. The deal was closed October 22, 1929, when $5,000 was paid to bind the transaction. Mr. Negus on behalf of the bank executed a deed to Lawrence on the same day, but held it in escrow until December 2, 1929, when the

[6] The record indicates that as early as 1925 through 1928 Lawrence shifted amounts of $715.37, $1,014.35, $4,738.27, $3,706.20 and (probably) $8,000 to V. A. Stein's account.

remainder of the cash payment was paid. By resolution dated November 12, 1929 the Board of Directors of the Bank approved the sale to Lawrence Stein. The district court found that Lawrence was "without doubt the real purchaser and was thus understood to be so by the bank".

There is evidence that V. A. Stein recognized that Lawrence had an interest in V. A.'s principal savings, a certificate of deposit for $10,000 at the Citizens Bank. V. A. Stein cashed this certificate and made a $10,000 first mortgage loan. The mortgage notes were left for collection at the Old Citizens Bank, under a memorandum written by the Bank's President but signed by V. A. Stein: "On Wynn & Hafter $10,000,—a/c V. A. Stein and Lawrence Stein, ½ and ½, 9/11/28". This is an independent record that V. A. had at least $5,000 which he regarded as Lawrence's. These mortgage notes had a bearing on the down payment for the Johnson Place. March 22, 1930 V. A. Stein sold the notes to his daughter, Mrs. Gold. The proceeds were placed the same day in the V. A. Stein account at the bank and used to retire a $7,500 demand note V. A. Stein had made at his bank December 2, 1929. The proceeds of this demand note had been used by Lawrence that same day to complete the down payment on the Johnson Place.

There is a great deal of evidence corrobating Lawrence. Two sisters, Mrs. Cornblatt and Mrs. Schwartz, and Sam testified for Lawrence.[7] Neil Magruder, an

[7] Mrs. Stein's will left her estate to Sam. Sam did not want to take under this, since he felt that he should not have more than a one-eighth part of the property, and the will was never admitted to probate. Sam testified that at

accountant who set up books for Stein Brothers in 1941, testified that he set up accounts for each heir based on a one-eighth interest "in the home place" only. On the first trial Mrs. Gold testified that Little Hope was the only property her father had.[8] She retracted this statement on the second trial, but did admit that the family referred to the Johnson Place land as Lawrence's. A number of witnesses supported Lawrence's position: Mrs. Goodman, a relative;[9] John McMillan, first manager of

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the family meeting held to discuss his mother's will Lawrence "got up and said: 'There ain't but one way I will work this property. . . . Papa didn't leave any money and Mamma didn't leave any money. I will rent it from you folks just like I did from Papa and Mamma. . . .' They all agreed to rent it to Lawrence Stein." Mrs. Cornblatt and Mrs. Schwartz testified to the same effect.

[8] On the first trial in March, 1951 Mrs. Gold testified: ". . . Q. Well, other than Little Hope, did he [V.A. Stein] own any real estate? A. Not that I know of . . . . Q. Do you know anything about how that purchase was handled or anything about it? A. My father had cash money and he let Lawrence Stein have a certain amount of money to pay down on that place." On the second trial she testified: "Q. Did you say that that day? A. Well, at that time I didn't know of any other land that my Father owned; that is true. Q. You didn't know it at that time? A. No. Q. Had never heard of it? A. In his name. I didn't know he had any other land in his name, as it is stated there. Q. Those were correct answers? A. Yes sir. Q. 'Other than this land there, did he own any real estate?' And you answered, 'No, not that I know of.' A. Yes sir. Q. You were telling me the truth? A. Yes sir. . . . A. If that book (Old Record) has it that way, that was my statement then. But I do not remember my Father lending Lawrence money to go out and buy that place. . . ."

[9] Mrs. Goodman testified that V. A. Stein had told her before the Johnson Place was bought: "Lawrence had worked for him and with him and helped him in everything and he never did pay him any money," other than spending money, and that he, V. A. Stein, "owed him for the time he had worked for him."

the Stein Brothers gin;[10] Andre Worthington, raised with the Steins as children together; John J. Hall, a tobacco salesman; Leroy Shanks and Lloyd O. Patton,[11] long-time neighbors.

V. A. Stein's original will makes no mention of the Johnson Place as part of V. A. Stein's estate. The will left his "real, personal and mixed property" in trust, authorized the trustees to "operate said lands for farming purposes", and "further direct[ed] that my trustees maintain the home located on said property". The home was on Little Hope. Very significantly, the will, dated November 30, 1930, about a year after the purchase of the Johnson Place, provides that "any and all amounts heretofore given to my children or either of them directly or indirectly by gifts or by loan shall be considered as outright gifts, and shall not be charged in any way against their interest in my estate".

V. A. Stein executed a codicil December 30, 1930, giving to Lawrence "in fee, all of the stock of merchandise now located in the Chatham store, [the Johnson Place was at Chatham] together with all of the livestock and

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10 "A. Mr. Stein, he said yes, and said: 'It is a big place and I hope Lawrence does good with it.' . . . Q. Do you recall whether or not after that, during Mr. Stein's lifetime, you ever heard him make any claim of ownership to the Johnson Place? A. I never heard him claim ownership. . . ."

11 Patton testified: "A. Mr. V. A. Stein. He said, 'My boy Lawrence has bought the Harry K. Johnson Place.' Q. Do you recall that clearly? A. Yes sir. Q. What was his attitude? A. He was very proud of it. Q. You say he couldn't wait to tell you? A. He couldn't wait until I got in the door to tell me that. Q. Was Lawrence present? A. No, he wasn't there at the time. . . ."

farming implements that may be located on Chatham plantation at the time of my death". This indicates rather plainly that the testamentary trust did not include the Johnson Place. If the trust had included the Johnson Place and the store, it is hardly likely that V. A. Stein would have excluded from the trust the merchandise in the store, and the livestock and farming implements necessary for farming the tract. If, however, the Johnson Place and store belonged to Lawrence individually, it was logical and natural for V. A. to give Lawrence merchandise in his store and livestock and farming implements transferred from Little Hope to the Johnson Place.

Sol Stein entered in partnership with Lawrence in 1930 after the purchase of Johnson Place. The stock of merchandise in V. A. Stein's store was transferred to Stein Brothers' larger and better located store. The store bore the name "Stein Brothers" and it was known by this name in the Chatham community. Lawrence and Sol lived in quarters connected with the store. After several months the brothers built a cotton gin on the Johnson Place. They financed it, obligated themselves for gin machinery amounting to more than $16,000, gave a mortgage to Mississippi Cottonseed Company for cottonseed produced on the Johnson Place, and included the gin under the Federal Land Bank mortgage. The two brothers bought tools, equipment, livestock, seed, to carry on the farming operation. V. A. Stein was not obligated on any of the relatively heavy financing undertaken by these young men. The cotton gin, like the store, carried a

sign and was known to the community as the "Stein Brothers" gin. The crops and all of the operations of the gin were handled under the name of Lawrence Stein or Stein Brothers.

In 1930 Stein Brothers borrowed $12,000 from the First National Bank. The proceeds were deposited to the account of Stein Brothers. The signature for this account, and for accounts at the Greenville Bank & Trust Company, authorized only Lawrence to withdraw funds.

Fire insurance on the Johnson Place was carried in Lawrence's name from 1930 until 1948. In that year the insurance on Little Hope was carried with the insurance on the Johnson Place, but the policy separated the two tracts; the Johnson tract was described as "owned by Lawrence, the Little Hope tract was described as individually" owned by "Lawrence individually and the Estate of V. A. Stein".

In 1931, as owner of the Johnson Place, Lawrence resisted an effort of the Leota Drainage District to assess for drainage taxes a part of the Johnson Place; V. A. Stein joined as owner of Little Hope. In 1932 Lawrence was awarded a judgment of $8,000, when the Mississippi Levee Board condemned several hundred acres of the Johnson Place. Also in 1932 Lawrence received from his vendor, the First National Bank, 27 acres somehow lost in the original transfer; the deed was to Lawrence. In 1933 Lawrence executed a deed to the Levee Board

covering a small tract on the Johnson Place. In 1934, before the death of Mrs. Stein, and in 1943, Lawrence executed an oil and gas lease on the Johnson property. Lawrence Stein or Stein Brothers paid the annual installments of $1,300 to the Federal Land Bank, and always paid the taxes.

The evidence is not all one-sided. (1) When the First National Bank received payment checks for the Johnson Place a bank official noted on the ledger that the sale was to V. A. Stein. The same official, however, signed the deed to Lawrence Stein and was Secretary for the Board of Directors when the Board adopted its resolution approving the sale to Lawrence. (2) From 1930 to 1950 the property was usually assessed in the name of V. A. Stein. (3) V. A. Stein executed a ninety-nine year lease on a two-acre tract of the Johnson Place for a Presbyterian Mission Church. The description places the site in Section 14 (where Little Hope is situated), but then refers to its actual location on the Johnson Place. V. A. Stein had previously granted use of his old store building on Little Hope to be used for church services and it was so used until destroyed by fire. (4) Mrs. Gold, Mrs. Bird, and Mrs. Schlessinger testified that there was no agreement for Lawrence to rent Little Hope; that the Johnson Place, the store, the gin, all belonged to V. A. Stein; that all the properties were operated as one, because they were considered as belonging to the family as a whole.

Sol and Lawrence remained in partnership, apparently with no friction, until Sol died in 1943. He left his entire estate to Lawrence. The will provided: "I sincerely trust that my other brothers and sisters are not unmindful of the deep love and affection which I do now and always shall bear toward them as our ties or relationship and blood are close to me and my heart. However, it is my considered judgment that it will be to the best interest of our family for me to designate Lawrence my sole beneficiary. Lawrence and I have had the care of and the management of all the family's interests and after my demise I believe that it will be well to restrict him in such management. I have unbounded confidence in his ability, integrity and fairness and I know that he will always deal justly with my other brothers and sisters. However, I wish it distinctly understood that this expression is not to be construed as any reservation, limitation or restriction on the unqualified and outright devise contained in article two because my brother, Lawrence is to have the right and power to do with and dispose of with whatever he takes under article two the same as his own estate." Appellants construe the will as proving that Sol considered everything a family enterprise and "Stein Brothers" as the operating name of the entire family interests. But it may also be construed as the will of a man who felt free to dispose of his own property as he saw fit; hardly the will of a man holding title to property of another, with a last chance to declare the true ownership. In contradiction of his claim that he had exclusive ownership of the land at the Johnson Place, Lawrence as Executor of the estate and Sol Stein,

reported that Sol owned a one-half interest in the Johnson tract.

Weighing all the contradictory and conflicting evidence, the trial judge was convinced that the trust estate consisted solely of Little Hope. (1) As to the Johnson Place, "all of the important and serious acts of ownership were taken by Stein", individually or for Stein Brothers and not as trustee. (2) The Stein Brothers cotton gin and store were on Johnson Place, were built in 1930 and managed by Lawrence and Sol, and belonged to these two brothers. (3) The merchandise in the store and the livestock and farming implements on Johnson Place at the time of V. A. Stein's death were bequeathed to Lawrence individually. (4) The Jim Taylor tract of 40 acres belonged to Lawrence, a purchase made individually in May, 1933 upon foreclosure of a mortgage loan made in 1931. (5) There is no evidence that V. A. Stein left any cash or securities. Mrs. Gold, who resided with Lawrence for twenty-two years prior to 1949, kept Lawrence's bonds in her lock box, and enjoyed his confidence, did not know of any cash or securities left by her father, although she had always assumed that he owned securities Her father had borrowed $8,000 from her that was still owing at the time of his death. (Lawrence paid this $8,000 in 1942.) V. A. Stein had been a successful small farmer, averaging about forty bales of cotton a year, and he had operated a small store, but he had never been a person of wealth and he had raised a large family. For the last year of his life he had been bedridden, and for some years before his death he had done virtually nothing in the way of work.

We agree with the trial judge. We agree also there is no necessary inconsistency between his findings as to what constituted the trust estate in 1935 and our decision on the first appeal. In our earlier holding we decided that there was a valid express, testamentary trust; that Lawrence had acted as trustee, commingled funds, and should account to the beneficiaries. Our opinion does not mention the Johnson Place, cotton gin, store, or any property except Little Hope, and we did not purport to decide what property was held in trust.

III.

Appellants do not deny that Lawrence had record title to the Johnson Place or that he acted sometimes as titular owner. They say that all the money from the Johnson Place, cotton gin, store, and Stein Brothers assets came directly or indirectly from V. A. Stein and that the beneficial interest in these properties and other properties acquired with the profits of the various enterprises was in V. A. Stein and the family as a group. There is no evidence whatsoever that V. A. and Lawrence entered into any agreement to this effect. Appellants therefore are forced to rely on the theory that a resulting trust was created by operation of law, based on their proof that V. A. Stein paid for the Johnson Place.

The doctrine of resulting trusts cuts both ways in this case. "A resulting trust arises presumptively where a person makes or causes to be made a disposition of prop-

erty under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property. . . . [W]here property is purchased by one person and the property is transferred at his direction to another, it is inferred that the purchaser intended that the grantee should hold the property for the benefit of the purchaser." 4 Scott on Trusts, Sec. 404.1, p. 2922. See *Chichester v. Chichester*, 150 Miss.Sup.Ct. 48 So.2d 123; *Bush v. Bush*, . . . , Miss.Sup.Ct., 99 So. 191. The inference or presumption is to the contrary, however, where the title is taken in the name of a close relative. Thus, "where a parent purchases property in the name of his child, a gift is presumed even though the child is an adult". 4 Scott on Trusts, Sec. 442, p. 3035. See *Wilson v. Beauchamp*, 1870, Miss.Sup.Ct., 44 Miss. 556. Moreover "If A is indebted to B and at B's request A pays the owner of land for a conveyance to B, thereby discharging A's debt to B, B takes the title to the property free of trust". 4 Scott on Trusts, Sec. 446, p. 3050. "Where a transfer of property is made to one person, and the purchase price is advanced by another in discharge of a debt to the transferee, no resulting trust arises, since the payor intends that the transferee should have the beneficial interest in the property. . . . Such an intention may be shown not only by oral declaration of the payor's intention but also by the circumstances under which the transfer is made." Restatement of the Law, Trust, Sec. 441(d), p. 1350, *De Bardeleben Coal Corp. v. Parker*, 1932, Miss.Sup.Ct., 144 So. 474.

Lawrence was the favored son who worked more closely with his father and had shown more industry and initiative than his brothers and sisters. Even assuming that V. A. paid the entire purchase price the presumption is that the property was a gift to Lawrence. V. A.'s will supports this inference. Further, on the finding that whatever amount V. A. paid on the purchase price was paid in settlement of the money owed Lawrence, the presumption is that Lawrence took the property for his own account, and not as holder of the title for the benefit of others. "The fact that after the purchase the payor has exercised no dominion over the property but has permitted the grantee to deal with the property as his own is a circumstance tending to rebut the inference of a resulting trust." 4 Scott on Trusts, Sec. 441, p. 3025.

These are inferences only and may be rebutted, but they impose on appellants the burden of establishing the trust. In an old case, *Logan v. Johnson*, 1894, 72 Miss. 185, the Mississippi Supreme Court declared that this burden was heavier than in most cases: "Where it is necessary to prove by parol the existence of a [resulting] trust, the evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the beneficiary beyond a reasonable doubt."

In final analysis, the existence of a resulting trust depends upon the intention of the parties as inferred from all of the circumstances. This is a factual question the trial judge resolved against the appellants. Going

beyond the appellants' failure to meet the burden of proof, the trial judge held affirmatively that the facts showed there was not a resulting trust. We agree. We certainly cannot say it was clearly erroneous for the Court not to find that appellants established a resulting trust.

IV.

Appellants argue that since Lawrence, in breach of trust, commingled trust property with his own in one indistinguishable mass, all of Lawrence's property should be treated as part of the trust.

The Restatement on Trusts, Section 202(h) states the law as follows: ". . . Where the trustee wrongfully mingles trust property with his individual property in one indistinguishable mass, the beneficiary is entitled at his option either to enforce a constructive trust on the mingled property in such proportion as the trust property so mingled bears to the whole of the mingled property, or to enforce an equitable lien upon it to secure his claim against the trustee for the value of the trust property so mingled. . . . Where the trustee exchanges the mingled mass for other property, the beneficiary is entitled at his option either to claim a proportionate share of the product, or to enforce an equitable lien upon it to secure his claim for reimbursement. Where the property is or becomes more valuable than the mingled mass with which it is acquired, the beneficiary is entitled to a proportionate share of the property, and thus

to secure the profit which arises from the transaction. Where on the other hand, the property acquired is or becomes less valuable than the mingled mass with which it is acquired, the beneficiary can enforce an equitable lien upon the property as security for his claim against the trustee." See also Restatement on Restitution, Section 214.

Federal courts have followed these principles. *Marcus v. Otis*, 1948, 2 Cir., 169 F.2d 148; *MacBryde v. Burnett*, 1942, 132 F.2d 898; and *Elmer Company v. Kemp*, 1933, 9 Cir., 67 F.2d 948. The trustee has a duty to keep the trust res separate, and if he fails to do so he has committed a breach of trust. *Surgi v. First National Bank & Trust Co.*, 1942 5 Cir., 125 F.2d 425. The trustee has a right to show what property was his and what property belongs to the trust. See *Central National Bank v. Connecticut Mutual Life Ins. Co.*, 1881, 10 U.S. 54, 26 L.Ed. 693.

The Supreme Court of Mississippi has recognized that when a trustee has commingled trust property with his own property beneficiaries are not entitled to appropriate the trustee's property. They are entitled to an apportionment of the profits. In *Fant v. Dunbar*, 1893, 71 Miss. 576, 15 So. 30, Dr. Fant, a guardian, received a sum of money for his wards which he later used to purchase real estate in his own name. It appeared that part of the purchase money came from the wards' funds and the other part belonged to Dr. Fant. One of the wards filed suit against the guardian to establish his rights in

the real estate purchased with the commingled funds. The court held:

> "On the evidence it is entirely certain what part of the purchase-price of the lot described in the pleading and evidence was the money of his wards, and what part was the money of Dr. Fant, the guardian. Under these circumstances, his wards had the right, at their election, to charge their money, with interest upon the lot, or to take an interest therein proportionate to the amount of their money that went into it as compared to the purchase-price. They have not the right to elect to take the entire interest in the property, for that would be to appropriate not their own but the property of the guardian. Before making their election, the wards are entitled to have accounts stated in both aspects, and, being thus advised, to elect that which is the more beneficial to them."

The only distinction that can be drawn between *Fant v. Dunbar* and this case is that Dr. Fant misappropriated specific funds in a certain amount. That is not a distinction that touches the principles involved. Here, the master and the court determined the amount of the trust funds commingled and the amount of the mingled fund in order to work out a fair apportionment, as in *Fant v. Dunbar*.

V.

The argument for a resulting trust rests on showing that the circumstances raise an inference that the person

paying the purchase price of the property did not intend the title holder to take the beneficial interest. A constructive trust arises, however, regardless of intention, in order to prevent unjust enrichment. Intention is material, however, in determining whether there was a conscious wrongdoing.

When a trustee wrongfully mingles trust funds with his own funds, the beneficiary has an equitable lien on the mingled fund, or property acquired with the fund, to secure reimbursement. If a trustee is a conscious wrongdoer, the beneficiary is entitled to enforce a constructive trust upon the property but only to share proportionately in the value of the acquired property. Thus, the Restatement on Restitution, Sec. 210 provides, in part:

> "§210. Effect of Acquisition of Other Property with Mingled Funds.
>
> (1) Where a person wrongfully mingles money of another with money of his own, and with the mingled fund acquires property, the other is entitled to an equitable lien upon the property to secure his claim for reimbursement.
>
> (2) If the wrongdoer knew that he was acting wrongfully, the other is entitled at his option to a share of the property in such proportion as his money bore to the whole amount of the fund."

The Restatement on Restitution, Sec. 214, provides that these rules are applicable to non-fungible things as well as to money and fungible things. See also 4 Scott on

Trusts, Sec. 517.2, p. 3304; 54 American Jurisprudence, Trusts, Sec. 256, p. 199; *Marcus v. Otis*, 1948, 2 Cir., 169 F.2d 148. "It is well settled that if trust funds are mingled with personal funds of a trustee, the whole is impressed with a trust until separation of the trust property can be made, and that the trust is entitled to a proportionate part of the profits realized by the trustee in dealings with the fund in which the trust funds are mingled. And it is not necessary in asserting the rights of the cestui que trust that the trust funds be specifically traced. It is sufficient that they have been used by the trustee to augment a fund upon which profits have been realized." *MacBryde v. Burnett*, 1942, 4 Cir., 132 F.2d 898.

The district court found that Lawrence "honestly believed that he was renting the [Little Hope] property from the heirs"; that "Lawrence was acting in good faith and [was] not a willful violator of the trust"; "he did not realize that he was a trustee . . . but was under a misapprehension of the obligation". There is evidence to sustain the trial judge's finding: the family meeting for the reading of Mrs. Stein's will, at which Lawrence declared that he would not act as trustee, but would continue to pay rent to operate Little Hope; the corroborating testimony of two sisters, Mrs. Cornblatt and Mrs. Schwartz, and the brother, Sam Stein; the fact that Mrs. Ethel Gold, co-trustee, who resided with Lawrence for many years, never acted as trustee nor showed that she thought that there was a functioning trust. The trial judge might have held, consistently with his findings of no conscious wrongdoing that the beneficiaries were

entitled only to be made whole, and not to share in any profit made with the mingled fund. Instead the trial judge, leaning over backwards to be fair toward the beneficiaries, instructed the master "to award to the V. A. Stein trust a part of the grand total net income based upon the contribution to the said trust in the production of the overall net income [from all of Lawrence Stein's operations]". Lawrence has made no issue as to whether the trust has only an equitable lien, and we make no issue of it—except to point out that the trial judge went as far as we directed on the first appeal in an effort to avoid the trustees deriving any personal gain from the estate.

VI.

At the request of appellants, the district court appointed a master, an experienced certified public accountant, to audit the trustee's account and to determine the just interest of the trust in all Stein properties. The report is exhaustive, complies with the Court's instructions, and is as detailed, fair, and informative as the circumstances permitted.[12] It was a difficult task.[13] Prior to 1940 the

[12] Commenting on the master's report, the district judge stated: ". . . . The Master took a considerable amount of testimony, made personal inspections of the properties involved and was assisted from time to time by counsel for the respective litigants, and made a careful study of all the entire record; and I am of the opinion that his report is accurate and should be approved. . . ."

[13] The master stated in his report: "Reports prepared by the two firms of accountants contained information to the effect that they could not locate complete records for the entire period following March 10, 1935. It appears that very few records were available for the period prior to January 1, 1941, other than copies of income tax returns, reports

trustee kept no books whatever, except a check register. All his business transactions were evidenced by check stubs, cancelled checks, invoices, a ledger where he made memoranda. Lawrence made no effort to keep separate books for the trust; for fourteen years there was no dissension in the family and he was never asked to account as trustee. In 1941, Neil Magruder set up books for Stein Brothers, but even after that date there are some missing bank records and some missing Stein Brothers records, destroyed in 1945 not by Lawrence but by Magruder, after examination of the documents.

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prepared by the United States Treasury Department concerning taxable income of Stein Brothers and various memorandum books. The bookkeeper for Stein Brothers testified that many of the old bank statements and canceled checks had been destroyed from time to time when they thought that such records would not be needed further. On January 1, 1941, regular double-entry records were set up for Stein Brothers, but these records could not be relied upon to show all financial transactions as is clearly shown by the Trustee's first account filed with the Court. I refer to all of the adjustments appearing on the Profit and Loss Statement starting on page —43— of said account. Although these double-entry records were in use for the partnership, there were many other business transactions carried only in the personal bank accounts of the individual partners. Very few, if any, of the bank statements of the individual partners were available for the period prior to 1947. In an effort to prepare accurate statements to show the result of business operations of the defendants, both firms of accountants found it necessary to obtain numerous statements of account from creditors, doctors and purchasers of farm products to supplement the information appearing on the records of the Defendants. . . . The approximate total number of bales of cotton ginned during the various years was known, and through a careful analysis of the cotton sales made by Stein Brothers, it was possible to know the number of bales ginned for the Stein Brothers' farms. . . . As a test check upon the accuracy of your records, we made a detailed examination of your claimed expenditures for labor for the years 1948 through 1953, your cotton picking charges for the years 1948 through 1953, and your payments to tenants for the years 1945 through 1952. The total payments for these costs as shown by your books was $361,615.58. The total which we were able to verify in detailed varied from this amount by only $452.18. . . ."

Taking annual operating (profit and loss) statements for each calendar year beginning March 10, 1935 and ending June 30, 1956 the master found that the gross income from all properties was $3,083,750.46 and the net income $715,408.35. By the net worth method, however, the master found an ending worth of $785,336.40, or $69,928.05 more than the operating statements showed. He added this difference of $69,928.05 as "unidentified increase in net worth", added the market value increase on assets acquired since March 10, 1935, amounting to $35,184.50, and arrived at a figure of $820,520.90 for the total net gain on gross income of $3,083,750.46. This amounts to a profit of 26.6 per cent on the gross—a tidy profit.

As of March 10, 1935, Little Hope was valued at $15,120 against a total value of all Stein properties of $78,480. On the basis therefore of the relative value of all productive properties, the trust is entitled to 19.27 per cent of the total net gain. Subtracting debts from the gross values, the trust was valued at $7,120 or 13.05 per cent on the basis of comparative net worth. The master then determined that 28 per cent would be a fair and reasonable proportion of the total net income from all sources to assign the trust. In reaching this conclusion the master observed that the figure was, in his opinion, "slightly outside of all bounds of reason" but that he was actuated by his understanding that "every effort should be put forth to see that the trustee is not allowed to profit on the V. A. Stein trust". There is a serious question in our minds as to whether the master should have used 13.05 per cent or 19.27 per cent, since these percentages find definite support in the facts and com-

putations. But the error, if any, favors appellants. On principle, in a case where a trustee has commingled funds and kept incomplete records (for whatever reason), we believe that it is proper to allow a reasonable margin of error in favor of the beneficiaries.

The master assigned 28 per cent of the total income of $820,520.90, or $229,745.85, as the trust net income from March 10, 1935 to June 30, 1955; and $172,381.48 as the trust income up to December 31, 1951. This division was made because February 27, 1952, the appellants (Mrs. Bird and Mrs. Gold) sold their one-eighth undivided interest and Dr. Wolfe and Mrs. Schlessinger their one-sixteenth each, or three-eighths to Sam Stein. The share of each appellant up to each December 31, 1951 amounts to $21,547.69. During this period Mrs. Gold withdrew $20,551.07, leaving a balance due of $996.62; Mrs. Bird withdrew $12,630.92, leaving a balance due of $8,916.77. The master then allowed each appellant 42.88 per cent profit on the balance due from January 1, 1952 through June 30, 1955. Accordingly, as of June 30, 1955 Mrs. Gold would be entitled to $1,423.97 and Mrs. Bird $12,740.38.

Appellants object strongly to the master's use of the "net worth theory", on the grounds that it is exclusively a tax fraud procedure and that the opening net worth was not established. Not all net worth cases are criminal prosecutions; many are civil cases. But if the net worth method is sufficient definite to provide the basis for depriving a man of his liberty, it seems to us that it is sufficient definite to have probative value in a civil case. The net worth method does not purport to be a

method of accounting; it is simply a means of proving income when records are inadequate. It may not be used as a substitute for the accounting a trustee is under the duty to render. But it seems reasonable to us that the net worth method be used, as in this case, as a check on the accuracy of an account the trustee has filed. Lawrence Stein filed an account. The account goes back to 1935. The master was required to audit that account. Many of the records were stale, missing, or inadequate. It was proper therefore to resort to the net worth method, not to dispense with the trustee's duty to account, but to adjust the account so that it would reflect more accurately the true income. Net worth is a method usually used to the disadvantage of an accused person or party defendant. It was used to Lawrence Stein's disadvantage in this case.

The master stated in his report that "doubtful questions have been decided adversely to the trustee". Thus the master believed that the opening net worth of Stein Brothers was a "minimum figure" so that "the effect in this report is that the overall net income is overstated"; depreciation of $9,747.40 on the Johnson Place buildings, other than the gin and store, was disallowed; Lawrence Stein's net post office commissions of $21,408.45 were added to the total income; the opening balance sheet for Stein Brothers assumes that there were no cash, no inventories, no accounts receivable; no allowance was made for Lawrence Stein's services in any capacity. The master adjusted the trustee's account upward by the net amount of $196,409.41.

As this Court said in *Bynum v. Baggett Transportation Company*, 1956, 5 Cir., 228 F.2d 566, when a master's findings of fact are adopted by the district court "the findings, when they reach us, have, therefore, a double insulation". On the record we cannot say that those findings are clearly erroneous.

VII.

There is a question as to whether the trust had any interest in the title to the Johnson Place, because of Lawrence Stein having used commingled funds to pay off the balance of the Federal Land Bank mortgage on the property. "The beneficiary cannot trace his cash into the fee simple title to the realty because that was held by the trustee before the misappropriation and as a result of a deed to him . . . Yet . . . it is just that the cestui should have a lien upon the realty to the extent that his funds have removed the mortgage encumbrance. Equity sanctions this result, and calls the process subrogating the cestui to the rights of the mortgage." Bogert on Trust, Sec. 930, p. 122. See also Restatement on Restitution, Sec. 207, p. 838; 4 Scott on Trusts, Sec. 513, p. 3275; *Windham v. Windham*, 1953, 218 Miss. 547, 67 So.2d 467; *Brabham v. Brabham*, 1955, 84 So.2d 147.

We have recognized the beneficiaries' right not only to reimbursement for all trusts funds commingled but to a proportionate share of the mingled fund, and we have protected the beneficiaries by impressing a constructive trust on all the Stein properties, the Johnson Place

included. The beneficiaries have no right to more. They are not entitled to share in the ownership of property Lawrence purchased six years before the trust was created.

VIII.

There is a dispute over a $5,000 bond Mrs. Bird said was part of a $10,000 gift to her from Lawrence. The master and the trial judge found as a fact that the $5,000 was paid by Lawrence Stein to Mrs. Gold on an indebtedness of Mrs. Bird to Mrs. Gold, on the instructions of Mrs. Bird. The trial judge agreed that the master properly charged the $5,000 against Mrs. Bird's account. We too agree.

Under the circumstances of this case, we believe that neither appellee nor appellants should be taxed with attorneys' fees or accountants' fees. In the exercise of our discretion, however, under Rule 31 of this Court and 28 U.S.C. 1913, we direct that the appellees be taxed with the costs of appeal.

The judgment is

AFFIRMED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals.
Fifth Circuit.
By CLARA R. JAMES,
Deputy.

New Orleans, Louisiana, Dec. 20, 1958.

APPENDIX B.

Southern District of Mississippi, Filed Oct. 24, 1958, Loryce E. Wharton, Clerk, By Ruby L. Short, Deputy.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

October Term, 1957

No. 16,826.

D. C. Docket No. 474 Civil

MRS. BRYNIA BIRD and MRS. ETHEL GOLD,
Appellants,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS, and L. B. STEIN,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RIVES, BROWN and WISDOM, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellees, Lawrence Stein and Sam Stein, Individually and as Co-Partners of the Partnership known as Stein Brothers, and L. B. Stein, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 30, 1958.

Issued: Oct. 22, 1958.

Clerk's Costs:
Docketing cause, etc. . . $25.00

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals.
Fifth Circuit.
By GILBERT F. GANUCHEAU.
Deputy.

New Orleans, Louisiana.

Entered COB 3—Page 370.

Oct. 22, 1958.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 14,228.

MRS. BRYNIA BIRD and MRS. ETHEL GOLD,
Appellants,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS and L. B. STEIN,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(May 8, 1953.)

Before HOLMES, STRUM and RIVES, Circuit Judges.

HOLMES, Circuit Judge: The appellants brought this suit to obtain an accounting and discovery from two of their brothers, alleging that one of the brothers, Lawrence Stein, as co-trustee with the appellant Ethel Gold under the will of their father, V. A. Stein, had operated the trust property, a plantation in Mississippi, for his own benefit and had commingled the profits thereof with his own funds. The appellees denied that a trust existed, or that Lawrence Stein ever qualified as Trustee under

the will of his father. They contended that Lawrence Stein had an agreement with all of the interested parties that he would rent the property from them on a year to year basis; and that, as a matter of law, a trust was not created under his father's will, since their father and mother owned the property as joint-tenants.

The court below held as a matter of law that no trust existed under the will, since the property passed to Sarah Stein, as joint-tenant, upon the death of her husband. The court found as a fact that Lawrence Stein had merely rented the property; and judgment was entered for the defendants.

All the parties involved in this controversy were the children of V. A. and Sarah Stein, who died in 1933 and 1935, respectively. In 1904, they acquired title to a plantation known as "Little Hope" by a deed in which it was stated that the land was conveyed to V. A. Stein and Sarah Stein, "as joint-tenants and not tenants in common." During the last three years of his father's life, 1931-1933, Lawrence claims to have rented the plantation from his father under a verbal lease for $3,000 a year, his mother having nothing to do with the transaction. At one time during his lifetime, the father individually executed a deed of trust covering the farm implements and the livestock and crops grown on the plantation. From 1928 through 1950, the property was assessed on the land rolls as the "V. A. Stein Property."

By a will dated November 26, 1930, V. A. Stein undertook to devise to his wife a life estate in all of his property, with the remainder in trust for his children and two grandchildren, naming his daughter Ethel and son Lawrence as co-trustees of the estate. Soon after making the will, V. A. made a codicil in which he bequeathed all of his personal property to Lawrence. The will was probated, and Ethel and Lawrence qualified as executors. Lawrence did not question the will or ask to be relieved as trustee, but he testified that he continued to rent the estate from his mother on the same basis as during his father's lifetime, allowing her to obtain money as she needed it for doctor's bills, taxes, etc.

From the death of the father to the time of this suit, the insurance which was taken out on the property was written in the name of "Lawrence Stein, individually, and the estate of V. A. Stein." Lawrence accepted benefits under the will, claiming the personal property of the estate as a legacy bequeathed to him in the codicil; and recognizing that, at the time of his father's death, everything went to his mother for her lifetime. He also admitted that he recognized the trust in the will. He independently executed an oil and gas lease covering a portion of the estate, and signed it in the name of "V. A. Stein, by Lawrence Stein." In testifying with reference to his agreement with the other heirs to rent the property, rather than act as trustee, Lawrence was evasive, being unable to recall definitely when the agreement was made or whether all of the heirs were present at the time.

During the pendency of this suit, and after the defendants had filed their answer, Lawrence and three other heirs filed a suit in the state court to secure a partition of the property, alleging that each child owned a one-eighth interest. It was also stipulated on the trial below that each heir had a one-eighth interest in the estate. The will provided that the trust should become operative upon the death of Sarah, but that no funds were to be paid out during the first three years of the trust. The earliest records of any disbursements were those of Lawrence beginning in 1938, three years subsequent to the death of Mrs. Stein. Many of the notations relative to these disbursements were entitled "interest in estate," and from 1938 to 1940 not a single entry was charged to rent. Some of the heirs had received little, if anything, from the estate in the form of rent or otherwise.

In 1939, because of income-tax difficulties, an investigation was made of Lawrence's business records by both the state and federal governments. The federal investigation resulted in settlements being made for all or parts of the taxable years 1935 through 1939 for the "V. A. Stein Trust." The investigator's report, which was signed by the trustee, Lawrence, contained the statement that "deficiencies were fully discussed with Lawrence Stein, Trustee, who agrees to the report"; and the same shows a deduction of over four-hundred dollars as a trustee's commission. During this investigation, various letters were addressed to Lawrence Stein, as trustee of the estate. Beginning in 1941, information returns were annually sent to each heir, containing the words, "V. A. Stein Trust."

From the foregoing plain facts and other evidence in the record, we are of the opinion that Lawrence Stein was acting as trustee of the estate as provided under the will, but was commingling the funds of the estate with his own, and was not properly accounting to the beneficiaries of the trust. He at no time formally repudiated the trust, and is estopped to deny its validity. As such fiduciary, he may not derive personal gain from the estate. Furthermore, it is obvious that Sarah Stein accepted the will of her husband as being in force, and made no objection to its probation. Even though the estate which she held under the original deed prior to her husband's death was a joint tenancy, by electing to take under the will, and acquiescing in that part which bequeathed a portion of the property to her son Lawrence, she impliedly released any interest she might have had as a joint-tenant. All of the heirs, including Lawrence, accepted the will as being valid, and the latter complied with its provisions prior to his mother's death. As trustee under the will, Lawrence was under a duty to act solely in the interest of his beneficiaries. Having failed to do so, he has violated the trust, and is obligated to make full and complete accounting and discovery as prayed for in the appellants' complaint.

The judgment appealed from is reversed, and the cause remanded with directions that a full accounting be made, discovery had, a division of the estate effected as the interests of the parties may appear, and judgment

rendered against the appellee Lawrence Stein for any amount that may be due to the beneficiaries of the trust.

REVERSED AND REMANDED.

A True copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX D.

ON PETITION FOR A REHEARING.

(June 26, 1953.)

Before HOLMES, STRUM and RIVES, Circuit Judges.

HOLMES, Circuit Judge: A man may not step into and out of the role of trustee as his personal interest dictates; it is easier to step into the role than it is to step out of it; and the evidence in this case overwhelmingly shows that Lawrence Stein assumed the role of trustee under his father's will and acted in that capacity many times to his pecuniary advantage. We did not hold in our former opinion that a joint tenancy in Little Hope plantation, with the right of survivorship, was created in V. A. and Sarah Stein. All the parties in interest suppressed the will of the mother, obviously for the purpose of leaving in effect the trust created by the will of their father as to property in which it is stipulated that each has an undivided one-eighth interest. It would shock the conscience of the Court to allow a fiduciary to play fast and loose with his *cestuis que* trust.

The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JUDGMENT:

Extract from the Minutes of May 8, 1953.

No. 14,228.

MRS. BRYNIA BIRD and MRS. ETHEL GOLD,

versus

LAWRENCE STEIN AND SAM STEIN, INDIVIDUALLY AND AS CO-PARTNERS OF THE PARTNERSHIP KNOWN AS STEIN BROTHERS and L. B. STEIN.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court with directions that a full accounting be made, discovery had, a division of the estate effected as the interests of the parties may appear, and judgment rendered against the appellee Lawrence Stein for any amount that may be due to the beneficiaries of the trust.

It is further ordered and adjudged that the appellees, Lawrence Stein and Sam Stein, Individually and as Co-partners of the partnership known as Stein Brothers, and L. B. Stein, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Attest:

Clerk's Office:

A True Copy:

(S.) OAKLEY F. DODD,
Clerk, United States Court of Appeals, for the Fifth Circuit.

New Orleans, Louisiana, May 9th, 1953.